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BRIEF OF PLAINTIFF IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 866.

FREDERICK N. PAULY, RECEIVER OF THE CALIFORNIA NATIONAL BANK OF SAN DIEGO, PLAINTIFF IN ERROR,

vs.

THE STATE LOAN AND TRUST COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

J. WADE McDONALD,
(San Diego, California.)
Attorney for Plaintiff in Error.

Filed ..... *1895.*

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By .....

(15,750)

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SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 866.

FREDERICK N. PAULY, Receiver of the California National Bank of San Diego,
Plaintiff in Error,
vs.
THE STATE LOAN AND TRUST COMPANY.

Brief of Plaintiff in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement of the Case.

This is an action at law in the Circuit Court of the United States for the Southern District of California, by Frederick N. Pauly, as receiver of the California National Bank of San Diego, California, against the State Loan and Trust Company (a corporation) of Los Angeles, California, to recover an assessment made by the Comptroller of the Currency in the sum of twenty thousand dollars upon two hundred shares of the capital stock of said bank, which at the time of its suspension and insolvency, on the 12th day of November, 1891, stood on its books in the name of said State Loan and Trust Company, "pledgee."

The action was tried by the Court, a jury having been waived by a stipulation in writing, duly signed and filed, and the Court found all the issues in favor of the plaintiff except as to the ownership by the defendant of the two hundred shares of the capital stock of the insolvent bank, and upon that question found that on January 24th, 1891, one hundred shares of said stock, evidenced by certificate No. 286, were owned and held by one Havermale, and that the other hundred shares, evidenced by certificate No. 297, were owned and held by one Collins; and that on said 24th day of January said Havermale and Collins respectively endorsed and delivered their said certificates to the defendant as collateral security for their joint note in the sum of twelve thousand five hundred ($12,500) dollars, then owned and held by said defendant. What followed the assignment and delivery of said certificates to the defendant is set forth in detail in the seventh finding of fact, as follows:

"That said certificates, so endorsed as aforesaid, were delivered to said State Loan and Trust Company of Los Angeles, at the city of Los Angeles, on or about the 24th day of January, 1891, and were thereupon promptly, in ordinary course of mail, transmitted to the said California National Bank of San Diego, at San Diego, and were surrendered to it, and new certficates, numbered 308 and 309, respectively, were thereupon issued to said State Loan and Trust Company of Los Angeles, as pledgee, in lieu of said certificates numbered 286 and 297, respectively.

That said new certificates, numbered 308 and 309, respectively, set forth upon their faces that they were issued to said 'State Loan and Trust Company of Los Angeles, pledgee,' and each purported to be a certificate for one hundred shares of the capital stock of said California National Bank of San Diego.

That defendant has ever since that time held said certificates, nnmbered 308 and 309, as pledgee, and as

collateral security for the payment of said note and for the unpaid balance of the debt thereby represented."

Upon the foregoing facts the trial Court held that the defendant was not liable as a stockholder of the bank and rendered judgment that the plaintiff take nothing by his action, and in favor of the defendant for costs. From that judgment the plaintiff prosecuted a writ of error to the Circuit Court of Appeals for the Ninth Circuit, which Court affirmed the judgment of the Circuit Court, and the plaintiff, by direction of the Honorable Comptroller of the Currency, brings the case up to this Court on writ of error to the Circuit Court of Appeals.

Specification of the Errors Relied Upon by the Plaintiff in Error.

The plaintiff in error respectfully submits that both the Circuit Court and the Circuit Court of Appeals erred in holding that the acts of Havermale and Collins in assigning their certificates of stock in the California National Bank to the defendant, the State Loan and Trust Company, and the acts of the latter in surrendering to the bank the certificates so assigned to it by Havermale and Collins, and procuring the issuance and delivery to it by the bank, in lieu thereof, of certificates for the same number of shares in the name "State Loan and Trust Company of Los Angeles, pledgee," and retaining said certificates until after the insolvency and suspension of the bank, did not constitute the defendant a stockholder thereof within the meaning of Sections 5139, 5151, 5210 and 5234 of the Revised Statutes, nor subject it to the liabilities specified and provided for in and by said sections.

Points and Authorities.

Section 5210 of the Revised Statutes requires a full and correct list of the names and residences of all the shareholders of every national bank to be kept (posted) in its place of business and subject to the inspection of all its shareholders and creditors, and the taxing officers of the state, and that a copy of such list shall be verified by the oath of the president or cashier and transmitted to the Comptroller of the Currency on the first Monday of July in each year. And in *Waite* vs. *Dowley*, 94 U. S. 527–534, this Court declared the purpose of said requirement was "to furnish to the public, dealing with the bank, a knowledge of the names of its stockholders, and to what extent they might be relied on as giving safety to dealings with the bank."

The seventh finding of fact of the trial Court (*Trans.* page 11) shows that the assignments of their respective certificates for one hundred shares each of the capital stock of the California National Bank were made by Havermale and Collins to the defendant, the State Loan and Trust Company, on the 24th of January, 1891, and that said certificates were immediately transmitted and surrendered to the bank and two new certificates, each for one hundred shares of its capital stock, were issued and delivered by the bank to the defendant in lieu of the surrendered certificates, and that the defendant thenceforth held the same. This transaction necessarily eliminated the names of Havermale and Collins from the list of the bank's stockholders, as to the shares in question, and substituted in their stead the defendant under the designation of "State Loan and Trust Company of Los Angeles, pledgee," (*Trans.* page 11, finding 7, paragraph 3). And the defendant thus designated

was doubtless carried in the list of its shareholders kept by the bank in its place of business and in the copy of such list verified and transmitted to the Comptroller of the Currency on the first Monday of July, 1891, as provided for and required by Section 5210 of the Revised Statutes. These transactions constituted the defendant a shareholder within the letter as well as within the intent and purpose of the statutes.

Revised Statutes, Section 5139.

Morse on Banks and Banking, Sections 679, 680.

Cook on Stock and Stockholders, 3d Ed., Section 247.

Morawetz on Private Corporations, Section 852.

Thompson on Liability of Stockholders, Section 233.

Pullman vs. *Upton*, 96 U. S. 328.

Germania National Bank vs. *Case*, 99 U. S. 628.

In *Pullman* vs. *Upton*, as to the principle here involved, this Court said: "The only question remaining is, whether an assignee of corporate stock, who has caused it to be transferred to himself on the books of the company, and holds it as collateral security for a debt due from his assignor, is liable for unpaid balances thereon to the company, or to the creditors of the company after it has become bankrupt.

That the original holders and the transferees of the stock are thus liable, we held in *Upton* vs. *Trebilcock*, 91 U. S 45, and *Webster* vs. *Upton*, 91 U. S. 65; and the reasons that controlled our judgment in those cases are of equal force in the present. The creditors of the bankrupt company are entitled to the whole capital of the bankrupt, as a fund for the payment of the debts due them. This they cannot have if the transferee of the shares is not responsible for whatever remains unpaid upon his shares; for by the transfer on the books of the corporation the former owner is discharged. It makes no difference that the legal owner—that is, the one in whose name the stock stands on the books of the corporation—is in fact only, as between himself and his debtor, a holder for security of the debt, or even that he

has no beneficial interest therein." And in *Germania National Bank* vs. *Case* this doctrine was affirmed in the following unmistakable language: "It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman* vs. *Upton*, 96 U. S. 328; and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: *Adderly* vs. *Storm*, 6 Hill 624; *Rosevelt* vs. *Brown*, 11 N. Y. 148; *Bank* vs. *Burnham*, 11 Cush. 183; *Magruder* vs. *Colston*, 44 Md. 329; *Crease* vs. *Babcock*, 10 Met. 525; *Wheelock* vs. *Kost*, 77 Ill. 296; *Matter of Empire C. Bank*, 18 N. Y. 199; *Hale* vs. *Walker*, 31 Iowa 344. For this several reasons are given. One is that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former owner; and third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder."

In *Wheelock* vs. *Kost*, 77 Ill. 296 (cited in the above extract from the opinion of this Court), the Supreme Court of Illinois said: "The legal title to the stock was in appellant by his own procurement, although the equitable title may have been in other parties; but it would be a singular doctrine to hold that the creditor should seek out the equitable owner against whom to enforce his claim. Primarily, he may proceed against the party in whom is the legal title to the stock. Where shares of the stock in a banking corporation have been hypothecated, and placed in the name of the transferee, he will be subjected to all the liabilities of ordinary owners. It is for the reason the property is in his name, and the legal ownership appears to be in him."

One of the provisions of the Alabama statute with regard to the liability of stockholders (Revised Code,

Section 1760) is as follows: "The stockholders of any such corporation are liable for all debts due by it, at the time of its dissolution, to the extent of their stock." And in *National Commercial Bank* vs. *McDonald, et al.*, 92 Alabama 387, this provision was construed by the Supreme Court of Alabama to include a pledgee and fix the liability of a stockholder upon him, upon the facts disclosed by the following quotation from the opinion, viz:

"The first ground on which the bank resists its liability as a stockholder is that it held the stock as pledgee, or as collateral security for a debt due the bank by A. Proskaeur, who originally owned the stock. The facts are, Proskaeur, being indebted to the bank, delivered in 1881 the stock as collateral security for the debt, indorsing on the certificates a power of attorney, authorizing an officer of the bank to transfer the shares on the books of the insurance company. *The shares were noted on the stock ledger as held by the bank as collateral security.* They were transferred on the books and the certificates issued to Proskaeur were surrendered to the company, and new certificates issued November 14th, 1883, to and in the name of the bank, which was entered, and stood on the books of the company as a stockholder until the company failed and made the assignment."

That case is identical in principle with the case at bar, and the facts are "on all fours" with it.

When Havermale and Collins wrote their names across the backs of their respective certificates and delivered them to the defendant (*Trans.* page 11, finding 7, paragraph 1), as between themselves and the defendant, the title to the stock immediately passed to and vested in the latter.

Gilman vs. *Curtis*, 66 Cal. 116.

Johnston, Receiver vs. *Laflin*, 103 U. S. 800–806.

Cecil National Bank vs. *Watsontown Bank*, 105 U. S. 217–224.

In the case last named the question before the Court was the rights of the contending parties to two hundred shares of the capital stock of the Watsontown Bank which had theretofore been assigned by Powell & Co., the owners, to the president of the Cecil National Bank as collateral security for an indebtedness of Powell & Co. to said bank, and as to the effect of such assignment this Court said: "As between Powell & Co., and Tome, representing the appellants, the property in the shares of stock undoubtedly passed to the latter without the formality of a transfer on the books of the Watsontown Bank. As collateral security for the payment of their notes, discounted and held by the Cecil National Bank, and with the power to sell for the purpose of payment, the title passed by the delivery of the certificate, with the accompanying power of attorney." And the same doctrine is unequivocally enunciated in *Easton* vs. *German-American Bank*, 127 U. S. 532–539. And the fact that the Civil Code of the State of California, and the other authorities referred to by the Circuit Court of Appeals in its decision of this case (*Trans.* page 25, paragraph 3), declare a different rule, is immaterial because the question as here presented must be determined by the STATUTES OF THE UNITED STATES AND THE DECISIONS OF THIS COURT.

If upon the assignment and delivery to it by Havermale and Collins of their certificates of stock in the California National Bank the defendant had been content to *merely hold* the same as collateral security for the indebtedness of Havermale and Collins, they would still have remained the shareholders of record on the books of the bank, and no liability for the debts of the bank would have been cast upon the defendant; or if the

defendant had caused the shares to be registered in the name of a third party it would have escaped liability.

Anderson vs. *Philadelphia Warehouse Co.*, 111 U. S. 479.

Richmond vs. *Irons*, 121 U. S. 27.

Cook on Stock and Stockholders, 3 Ed. Sec. 466.

But by transferring the shares of stock covered by said certificates from the names of Havermale and Collins to its own upon the books of the Bank the defendant voluntarily, and for its own benefit, expunged the names of Havermale and Collins from the record, as to the stock represented by said certificates, and took upon itself "all the rights and liabilities of the prior holders of such shares." Revised Statutes, Section 5139. "It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock is liable to creditors as a shareholder, whether he be the the absolute owner or a pledgee only." *Anderson* vs. *Philadelphia Warehouse Co.*, *supra*. By Section 5139 of the Revised Statutes those persons only have the rights and liabilities of stockholders who appear to be such on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities, and succeeding to such rights, except by such transfer; *until such transfer* the *prior holder* is the stockholder for all the purposes of the law. *Richmond* vs. *Irons*, *supra*. But *after* such transfer *the transferee* "succeeds to all the rights and liabilities of the prior holder." Section 5139, *supra*.

Affixing the word "pledgee" to its name on the books of the bank, but without giving the name or names of the pledgors, did not prevent or affect the liability of the

defendant to the creditors of the bank for the following reasons, among others, to-wit:

1. Because Section 5139 of the Revised Statutes in direct and unequivocal terms declares that every person who causes or permits a transfer of the shares of a national bank to be made to him upon its books "shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares."

2. Because *pledgees* in whose names *as such* the stock of a national bank may stand upon its books *are not exempted from liability as stockholders* by Section 5152 of the Revised Statutes. "*Expressio unius exclusio alterius.*"

3. Because for its own purposes it substituted itself upon the books of the bank as the holder of the two hundred shares in question; and thereby acquired the right to vote those shares at any and all meetings of the stockholders, and to receive all dividends and other benefits resulting from such ownership; and acquired the right, and became invested with the power, to proportionately *control the policy of the bank.* "*Qui sentit commodum sentire debet et onus.*"

"A party can not apply to his own use that part of the transaction which may bring to him a benefit, and repudiate the other, which may not be to his interest to fulfill."

Heath vs. *West*, 28 N. H. 108.

Peers vs. *McLaughlin*, 88 Cal. 299.

The practice of pledging property by the borrower as security for the payment of the loan, and to insure the performance of agreements, is of great antiquity.

Genesis, xxxviii, 16, 17, 18.

Exodus, xxii, 26, 27.

Deut., xxiv, 6, 10, 11, 12, 13 and 17.

In view of the above citations, and others that might be given, it would be unwarrantable to assume that Congress was not as familiar with the law of pledges as with that of "executors, administrators, guardians, or trustees;" and the *omission of pledgees* from the exception declared in Section 5152 of the Revised Statutes must therefore be regarded as intentional.

The reason for this is plain. Executors, administrators, guardians and trustees do not, and can not, act in their own right or for their personal interest in respect of the subject matter of their trust, but deal with all the world and are dealt with by all in their representative character and capacity only. A pledgee, on the contrary, always assumes the relation of his own volition and for his own benefit. The record in this case shows that the defendant took the assignment of the stock in question in its own right and for its own exclusive benefit; that it surrendered the certificates assigned to it by Havermale and Collins and procured the issuance and delivery to it by the bank of new certificates for the same number of shares in its own name, but with the word "pledgee" affixed, and thereby assumed the position and attributes of an owner. The addition of that word if it indicated anything or was notice of anything to those dealing with the bank simply indicated and was notice that the defendant held and controlled the stock for *its own benefit*, and not as executor, administrator, guardian or trustee. The exemption of executors, administrators, guardians and trustees declared in Section 5152 of the Revised Statutes is applicable to and includes only those who are appointed and act purely in a representative capacity, and probably would not apply to cases where the trustee had a *personal interest* in the shares held in

trust. And to hold, upon the facts disclosed by this record, that the defendant is within the exemption of Section 5152 would, it seems to me, be both a manifest misapplication of principles and a plain perversion of the intent of Congress.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed with instructions to reverse the judgment of the Circuit Court and remand the case to that Court with directions to enter judgment upon the findings of fact (*Trans.* pp. 9 to 12) in favor of the plaintiff for the full sum demanded in his complaint, to-wit: Twenty thousand dollars, with interest thereon at the rate of seven per cent per annum from June 18th, 1892, and costs of suit.

J. WADE MCDONALD,
Attorney for Plaintiff in Error.

165-606

Office Supreme Court, U. S.
JAN 13 1897
JAMES H. McKENNEY,
CLERK.

165-606

Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 201.

FREDERICK N. PAULY, RECEIVER,

PLAINTIFF IN ERROR,

v.

THE STATE LOAN AND TRUST COMPANY.

BRIEF FILED BY LEAVE OF COURT ON BEHALF OF THOMAS P. BEAL, RECEIVER OF THE MAVERICK NATIONAL BANK OF BOSTON.

EDWARD W. HUTCHINS,
HENRY WHEELER,
for THOMAS P. BEAL, *Receiver.*

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 201.

FREDERICK N. PAULY, *Receiver, Plaintiff in Error,*

v.

THE STATE LOAN AND TRUST COMPANY.

BRIEF FILED BY LEAVE OF COURT ON BEHALF OF THOMAS P. BEAL, RECEIVER OF THE MAVERICK NATIONAL BANK OF BOSTON.

The Receiver of the Maverick National Bank of Boston is plaintiff in error in case No. 366, Beal, Receiver, *v.* Essex Savings Bank, now pending in this court, which involves a similar question to that presented in this case. He therefore presents the following brief in support of the right of the plaintiff in error in this case to recover judgment against the defendant.

STATEMENT OF FACTS.

The defendant made a loan to certain shareholders in a national bank, and as collateral security for the payment of the same received from them their certificates of stock endorsed to the defendant. The defendant surrendered these certificates to the bank, which issued in place thereof new certificates in the name of the defendant containing the addition, "pledgee." The exact language of the certificate is not given in the record, but we assume that it was in the ordinary form of a certificate of bank stock, and read substantiall as follows:

"Be it known that the State Loan and Trust Company, pledgee, is entitled to one hundred shares in the California National Bank of San Diego, transferable only at the bank."

We also assume that an entry was made upon the books of the bank, stating that the shares were held by the defendant as pledgee. This may be implied from the ninth finding of fact by the Court. (Record, page 11.)

The bank became insolvent and an assessment upon the shareholders was ordered, and this suit was brought to recover of the defendant its share of the assessment. The question presented for decision is whether a pledgee of national bank stock holding the same registered in his name "as pledgee," without any statement as to the person for whose debts it is held, is liable for an assessment on the stock as "a shareholder," under Sect. 5151 of the Revised Statutes of the United States, which contains the following provision: —

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The Court below decided that the defendant was not liable, and the correctness of that decision is brought before this Court by writ of error.

Argument.

I.

The decisions are numerous that, in passing upon the question of who is liable as a shareholder under this section, the Court is governed by the legal ownership as disclosed by the stock registry, and will not relieve the registered owner because he is merely a pledgee.

The rule of law is thus stated by Mr. Justice Strong: —

"It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors."

National Bank *v.* Case, 99 U. S. 628.

And is put as follows by Chief Justice WAITE: —

"It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock is liable to creditors as a shareholder whether he be the absolute owner or a pledgee only."

Anderson *v.* Phila. Warehouse Co., 111 U. S. 479.

The first case that arose under the bank act, where the question of the liability of the pledgee arose, was —

Magruder *v.* Colston, 44 Md. 349.

There it was held that the fact that the shareholder was in reality only pledgee was no defence; the Court saying,—

"Stockholders are those who appear on the books of the bank as owners of shares. and who are entitled to manage its affairs, and they can only throw off the liabilities incident to that relation by transferring the stock. Until this is done they continue to be stockholders within the meaning of the banking act. If we depart from the terms of the law, and inquire into the equities which may exist between the stockholders and third persons, it cannot fail to embarrass creditors in seeking a remedy for the wrongs which may have been done by the corporation. *If the creditors must look beyond the legal title as exhibited by the books of the bank, they can never know against whom to proceed.*"

To the same effect are

Moore *v.* Jones, 3 Woods, 53.

Wheelock *v.* Kost, 77 Ill. 296.

Hale *v.* Walker, 31 Iowa, 344.

II.

In so construing the bank act, the Courts have but followed the construction given to similar statutes governing other corporations.

This Court decided in Pullman *v.* Upton, 96 U. S. 328, that a person to whom stock in an insurance company had been transferred was liable for an unpaid balance due on the stock, although he held it as collateral security only.

In Massachusetts it was provided by the Chapter 36, Sect. 31, of the Revised Statutes of 1836, that —

"the holders of stock in any bank at the time when its charter shall expire, shall be liable, in their individual capacities, for the payment and redemption of all bills which may have been issued by said bank and which shall remain unpaid, in proportion to the stock they may respectively hold, at the dissolution of the charter."

Under this act, it was decided by the Supreme Judicial Court of that State, Shaw, C. J., giving the opinion, that persons to whom stock had been transferred were liable although they were pledgees only. The Court said: —

"Upon this point, the Court are of opinion that if a person was the holder of stock at the time of the dissolution of the charter, although he held the shares as collateral security, or as trustee for other persons, he was not on that account exempted from individual responsibility. The case is of one who, according to the usual and ordinary sense of the term, is a stockholder; *one whose name is entered on the books, who holds a certificate*, and who is otherwise recognized by the corporation as a member, with the usual rights and powers incident to such character as stockholder and corporator, such as voting at meetings, serving as director, receiving dividends, and making transfers, although he may be bound in conscience, or by contract, to account to other persons for the income or for the shares themselves, in part or in whole. *He has the entire proprietary interest, and may have a large beneficial interest. The party pledging or mortgaging may or may not redeem and regain the property;*

it is at his option. Such a proprietary interest, therefore, so far as it affects the real property in the shares, may be ultimate and final in the holder. We think that it was the intention of the legislature that the whole number of shares comprising the stock should contribute to the deficit of a fund in which the holders have a common interest, and in the profits of which, if it had proved profitable, they would have proportionably shared. No other view could have given this provision the semblance of an equitable assessment on the shares. It presumed that the whole number of shares must be held by individuals, and therefore that either the trustee or the *cestui que trust*, the holder for security or the party pledging, should be liable under this provision. The difficulties of charging the latter render it quite improbable that it was so intended by the legislature."

"In case of trusts, the *cestuis que trust* may be minors, married women, strangers, persons *non compotes mentis*, or not in being. *In case of collateral security, the pledger has no disposing or controlling power, cannot chose directors, cannot, by statute, be a director, cannot be said to have an interest in the stock: but only a right, on certain terms, to acquire such an interest.*"

Crease *v.* Babcock, 10 Met. 525, at page 545.

In New York, Pennsylvania, Ohio and Wisconsin a similar rule has been adopted, making the registered owner liable although a pledgee only.

Adderly *v.* Storm, 6 Hill, 624.

In re Empire City Bank, 18 N. Y. 199, at page 223.

Rosevelt *v.* Brown, 11 N. Y. 148.

Aultman's Appeal, 98 Pa. St. 505.

Henkle *v.* Salem Mfg. Co., 39 Ohio St. 547.

Sleeper *v.* Goodwin, 67 Wis. 577.

"Stockholders who have transferred their shares by way of hypothecation certainly retain an equitable interest in them, and hence are in some sense equitable owners; but the parties to whom the stock was transferred, and in whose name it is registered, are the stockholders."

Denio, J., in —

Matter of the Empire City Bank, 18 N.Y. 199, at pages 223, 224.

"Any other rule would, in my opinion, conflict with the policy of the law, for under no other rule could a dealer with the company ascertain with certainty the individuals to whom, in the event of the dissolution of the corporation, he may have recourse."

Johnson, J., in—

Rosevelt *v.* Brown, 11 N. Y. 148.

In England the rule is the same.

Price & Brown's Case, 3 De G. & Sm. 146.

Newry Ry. Co. *v.* Moss, 14 Beav. 64.

Hoare's Case, 2 Johns. & H. 229.

III.

It may be argued for the defendant that the addition of words "pledgee" in the transfer and in the certificate, shows that the purpose was not to transfer the title in the stock to the defendant, but merely to give to the defendant a lien upon it, and that, in spite of the transfer, Havermale and Collins remained the legal owners of the stock, or shareholders.

This argument is unsound.

We submit that by surrendering the old certificates standing in the names of Havermale and Collins and taking out the new one in its own name the defendant became the shareholder notwithstanding the fact that by the addition of the word pledgee notice was given that the title was not absolute.

Section 5139 of the Revised Statutes is as follows: —

"The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of

such shares, and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired."

This language was contained in the original Bank Act, 13 Statutes at Large, 99, Section 12, and there immediately followed, as part of the same section, the provision for personal liability, as follows: —

"The shareholders of each association formed under the provisions of this act, and of each existing bank or banking association that may accept the provisions of this act, shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares."

It will therefore be seen that in imposing the liability, the statute in the first place defined the shareholder as being the person to whom the shares are transferred on the books of the association, and then placed the liability to the assessment upon the shareholders. The intent of Congress is thus clearly indicated. No more explicit language could be found to impose the liability upon the person named on the books of the bank as transferee.

Is not the defendant exactly within this definition? Is not it the person to whom Havermale and Collins have transferred their shares on the books of the bank? And has it not "become a shareholder by such transfer" and "succeeded to all the rights and liabilities of the prior holder of such shares"? If it has not, this language of the statute would seem meaningless.

If the registered transferee is not liable, who is? Suppose the pledgor should assign his right to redeem to a third person; there would not be any place on the books of the bank for the record of such a transaction.

It is easy to see how embarrassing and difficult it would

be to enforce the personal liability, were such questions open. To avoid such difficulties, the provision was made that the person to whom the stock was transferred should succeed to the liability.

The statute does not contemplate or provide for any severance of the ownership of or interest in the stock, such as a registry of the interest of a pledgor in one person, and the interest of a pledgee in another, which would require the association to issue two certificates representing one and the same share. The statute contemplates one registered holder, who shall be entitled to all the rights and subject to all the burdens of a shareholder, and whose identity it shall be easy to fix.

Section 5139 provides for only one kind of transfer, and that is a transfer of the legal title, which shall carry with it the liabilty to assessment. Such a transfer was made in the case at bar, and the liability follows.

The effect of the word "pledgee" added to the name of the holder does not mean that the State Loan and Trust Company is not the shareholder, a construction which would negative the direct statement in the certificate that it is the shareholder, but it means that it holds the shares subject to the right of redemption; it is inserted in the certificate because it was inserted in the transfer, and it was there inserted to give the bank notice of the equitable title of the pledgor. To say that the addition of the word "pledgee," which shows merely how the legal title to the stock is held and that it is subject to the equitable rights of other parties, shows that the State Loan and Trust Company is not the shareholder is paradoxical. It is absurd to say that the ownership and legal title to shares is not represented by the only certificate therefor which exists, and that the only certificate representing these shares is a certificate representing not the shares, but only the right to obtain them on non-payment of a debt.

Such a construction of the transfers and certificates not only violates the terms of the statute, but the language of the instruments themselves.

The defendant was the only person shown on the books as the shareholder, and therefore the only person to whom the statute liability could apply. The receiver is not obliged to take the burden of proving, by evidence outside of the books, who had an equitable interest in the stock.

The defendant might have avoided becoming a shareholder within the statute and have escaped liability, by simply taking the old certificates endorsed in blank and holding them without having them transferred to it, or it might have had the shares transferred into the name of a dummy. There were, of course, risks in taking either of these courses. The dummy might be wicked, and transfer the shares to a purchaser for value without notice; if instead of transferring to a dummy the certificates had been endorsed in blank they would have passed by delivery, and might be stolen and come into the hands of an innocent holder. The defendant was unwilling to take the risks of either of these methods of avoiding liability, and insisted on having the stock transferred to it and on becoming the shareholder thereby. The defendant must therefor bear the burden as well as have the advantages of this position. As it became a shareholder the fact that the corporation or others were notified that the shares were held in pledge or as collateral security is immaterial.

Newry Ry. Co. *v.* Moss, 14 Beav. 64.
Wheelock *v.* Kost, 77 Ill. 296.
National Commercial Bank *v.* McDonald, 92 Ala. 387.

In the latter case it appears that it was noted on the stock ledger that the shares were held as security so that the case seems practically identical with that at bar.

IV.

The only decisions that we have seen which are at variance with the rule that the person in whose name the stock is registered is the holder for the purpose of fixing liability are the opinions of the Circuit Court and Circuit Court of Appeals, in the case at bar.

Record, page 14.
Record, page 24.

And the opinion of the Circuit Court of Appeals for the First Circuit in the case of

Beal *v.* Essex Savings Bank, 67 Fed. Rep. 816.

In these cases there was indicated on the stock certificate and on the books of the corporation that the transfer was in pledge or as collateral security, and it was decided that the pledgee was not liable.

Each of the three courts dealing with the question placed their decision on a different ground. In Pauly *v.* State Loan and Trust Company, in the Circuit Court, the Court (Ross, D. J.) said: —

"The precise question involved was not presented in any of the numerous cases that have been cited by counsel. But, in my opinion, the doctrine of the case of *Anderson* v. *Warehouse Co.*, 111 U. S. 479, carried to its logical conclusion, exempts the defendant from the liability with which it is sought to be charged. In that case the Supreme Court — while declaring it to be well settled that one who allows himself to appear on the books of a national bank as an owner of its stock is liable to the creditors as a shareholder, whether he be the absolute owner or pledgee only, and that, if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors, and that it is also true that the beneficial owner of stock registered in the

name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder — said it knew of no case that held that a mere pledgee of stock is chargeable where he is not registered as owner."

The Court then stated the facts in *Anderson* v. *Phila. Warehouse Co.*, 111 U. S. 479, and quoted from the opinion, and then proceeded as follows: —

"It seems to me there was stronger ground for holding the warehouse company liable in the case from which the quotation has been made, than there is for holding the defendant in the present case liable. Here it is not pretended that there was any fraudulent conduct on the part of the defendant. There that claim was made, and it constituted the ground of the dissenting opinion of two of the justices of the court. If the holding of the stock as pledgee rendered the warehouse company liable under the statute, it could not have relieved itself of that liability by causing the stock to be placed upon the books of the bank and a certificate therefor to be issued in the name of one of its irresponsible employees; for the same case declares it to be well settled that a liability incurred cannot be so avoided. The warehouse company was without any liability, because, being pledgee only, it was not the real owner of the stock, and it was not liable as the apparent owner because it did not appear upon the records of the bank as such apparent owner; and hence no one could have been misled by its acts.

"Applying this reasoning to the case at bar, the defendant bank must be held not liable. If, as held in *Anderson* v. *Warehouse Co.*, a pledgee is not liable because not the real owner of the stock, it is manifest that the record of the truth upon the books and certificate of the bank that the stock is held in pledge cannot render such pledgee liable. Any and every person dealing with the bank is thereby apprised that the pledgee only holds the stock as security for some debt or obligation, and that the real owner of it is the pledgor, to whom he must look for the statutory liability."

With all respect we submit that the Court failed to appreciate the true ground of the decision in *Anderson* v. *Philadelphia Warehouse Co.*, 111 U. S. 479. In that case the Philadelphia Warehouse Company received the stock in

question as collateral security, and, instead of having it registered in its own name, had it put in the name of a clerk, for the purpose of avoiding liability for an assessment. In previous cases where a shareholder in a national bank, knowing that the bank was insolvent, transferred his stock into the name of an irresponsible third party for the sake of avoiding liability for assessment, it had been held that this was a fraud upon the creditors, and the stockholder could still be held liable as though no transfer had been made.

Adams *v.* Johnson, 107 U. S. 251.
Bank *v.* Case, 99 U. S. 628.

In *Anderson* v. *Philadelphia Warehouse Co.*, it was held that there was no such fraud in a pledgee having the stock registered in another person's name, and that, as the name of the warehouse company did not appear on the stock register, it was not liable for the assessment. The statement of Judge Ross, "If, as held in *Anderson* v. *Warehouse Co.*, a pledgee is not liable because not the real owner of the stock," is erroneous. *The pledgee in that case was relieved, not because he was not the real owner, but because he did not appear on the register as a stockholder.*

When Pauly *v.* State Loan and Trust Company came before the Circuit Court of Appeals, the judgment of the lower court was affirmed, on the ground that, by the California code, as construed by the Supreme Court of California in —

Cross v. *Canal Co.*, 73 Cal. 302, —

the legal title in pledged stock is in the pledgor, and that therefore the pledgor was liable, although not appearing on the books, notwithstanding the fact, as stated in that case, that the Supreme Court of the United States had decided that the legal title in such a case was in the pledgee in —

Easton v. *Bank*, 127 U. S. 532.

How the question of title, as between pledgor and pledgee, as settled by the California code, could control a liability fixed by the national bank act upon the registered shareholders, is not stated.

If the case at bar is to be decided upon the construction of the California code, its decision is of no importance to the parties interested in Beal *v.* Essex Savings Bank, and we therefore do not propose to discuss that code or its effect upon the case.

In Beal *v.* Essex Savings Bank, 67 Fed. Rep. 816, the Court decided that the person to whom the shares were transferred as security was not liable because the word "shareholder" used in the statute had a different meaning from the word "stockholder." The Court said: —

"Sections 5139 and 5151 of Revised Statutes, which are relied on by the appellant (complainant below), use throughout the word "shareholder," and avoid all such general expressions as "holder" or "owner of stock." A shareholder in a corporation is one who has a proportionate interest in its assets, and is entitled to take part in its control and receive its dividends. In all essential particulars he is distinguishable from a creditor of a shareholder. By the very root of the word he is entitled to a present share in the assets of the corporation and receives presently and immediately the benefits of the share, which the creditor does not even if he holds corporate stock as security, because the creditor's rights in this respect are only contingent and remote."

We respectfully submit that the learned Court was in error in two respects in this statement. In the first place, we submit that the distinction drawn by the Court between the expressions "shareholder" and "stockholder" is not correct. The members of a corporation are the owners of its capital stock, that stock is divided into shares, and certificates indicating the number of shares owned by the different members are issued and held by them, as their muniments of title. The members are called indifferently stockholders or share-

holders, and we are not aware that it was ever before suggested that the two words did not mean precisely the same thing, namely: the holders of shares of the capital stock of a corporation.

The Court, we submit, was also in error as to the rights of one to whom stock is transferred in pledge. Such a transfer vests the legal title in the pledgee. Where a chattel is pledged the legal title and general ownership remain in the pledgor, subject to a lien held by the pledgee, yet where choses in action, such as negotiable paper or corporate stocks, are transferred in pledge, the legal title passes to the pledgee.

Jones on Pledges, Sect. 9.

This court has decided that the legal title passes to the pledgee, both in the case of a pledge of shares of corporate stock,

Pullman *v.* Upton, 96 U. S. 328;
Cecil National Bank *v.* Watsontown National Bank, 105 U. S. 217;

and also in the case of a pledge of bonds.

Easton *v.* German American Bank, 127 U. S. 532.

So the right to receive dividends belongs to the transferee in pledge, in the absence of any agreement to the contrary.

Herrman *v.* Maxwell, 47 N. Y. Superior Ct. 347.
Fairbank *v.* Merchants Nat. Bank, 132 Ill. 120.
Central Nebraska Nat. Bank *v.* Wilder, 32 Neb. 454.

And the right to vote belongs to the person to whom the stock is transferred, although a pledgee only.

Ex parte Willcocks. 7 Cow. 402, see pp. 410, 411.
Vail *v.* Hamilton, 85 N. Y. 453.
In re Argus Printing Co., 1 N. Dak. 434.
Commonwealth *v.* Dalzell, 152 Penn. St. 217.
Crease *v.* Babcock, 10 Met. 525.

The pledgor's remedy in case the pledgee proposes to vote contrary to the pledgor's interest is by bill in equity for an injunction.

2 Thompson on Corporations, § 2626.
McHenry *v.* Jewett, 26 Hun, 453.

Instead of the right of the creditor holding stock as security being only "contingent and remote," as stated by the Court in Beal *v.* Essex Savings Bank, Shaw, C. J., in Crease *v.* Babcock, 10 Met. 525, already quoted from, stated that the creditor had the entire proprietary, and might have a large beneficial interest, and that the pledgor could not "be said to have an interest in the stock, but only a right on certain terms to acquire such an interest."

In Beal *v.* Essex Savings Bank, the Court also laid stress upon the words in the statute that the liability was to be "in addition to the amount invested in such shares," and it was said that the selection of these words indicates that Congress had in mind the common and popular sense of the word "shareholder," as already defined by the Court, and that the creditor "does not invest in the stock in any fair sense of the expression until he has been compelled to accept full legal and equitable title to it towards the satisfaction of his debt."

We submit that this argument in favor of the defendant is not well founded. The framers of the Act added the words "in addition to the amount invested in such shares," because it was necessary to add those words to express clearly the meaning. If the section had only said that the shareholders were to be liable "to the extent of the amount of their stock therein at the par value thereof," and had stopped there, it might have been construed to mean that a subscriber who had paid into the bank par value for it, had satisfied any claim that could be made under the section.

The words "in addition to the amount invested in the shares" were added to show that this was a separate and distinct liability for an assessment upon the shareholders, and the fact that they had paid for the shares to the bank, or to a person of whom they had been purchased, or acquired in any way, was not to be considered as any satisfaction of the liability. Further, the creditor who lends on the collateral security of stock would, in common parlance, be said to have made his investment at the time he made his loan, not at the time he was obliged to foreclose as suggested by the learned Court. The expression "amount invested in such shares" was apparently purposely selected to cover any payment or consideration given by the holder for them.

Stress was also laid by Judge Putnam, in Beal *v.* Essex Savings Bank, on the fact that the defendant had never estopped itself by holding itself out as other than one holding the stock as collateral. We think that we have already demonstrated that the reason for holding the registered shareholder liable rests mainly on the language of the statute, and that estoppel is by no means the sole reason for holding a transferee of stock liable to an assessment. Of this opinion was the Court in Bank *v.* Case, 99 U. S. 628, where estoppel was mentioned as only one of several reasons for holding the registered holder liable.

There is one other case which requires notice, namely: Welles *v.* Larrabee, 36 Fed. Rep. 866. In that case a bank received stock as collateral security, and had it transferred into the name of one Larrabee, "trustee," and it was decided that neither the real pledgee, which was the bank, nor Larrabee, the trustee and stockholder, was liable for an assessment on the stock; the Court said that Larrabee was not a shareholder, because he had no beneficial interest in the stock, but that if he were a shareholder, he was a "trustee," and therefore exempt under Rev. Stats. § 5152.

We submit that he was a shareholder notwithstanding the dictum of the Court to the contrary. A person in whose name stock is placed for the benefit of another is a shareholder, although he has no beneficial interest in the stock, he becomes a shareholder by the transfer to him in the manner pointed out by the statute for becoming such. The only true ground of exempting Larrabee from liability was the fact that he was a trustee within Section 5152.

If it had not been for this express exemption in the statute, the trustee would be personally liable, because he was a shareholder. In the well-known case of the failure of the Glasgow Bank, persons were held liable as contributories, although their names appeared on the stock register as trustees for others.

Muir *v.* Glasgow Bank, 4 App. Cas. 337.

V.

Furthermore, Section 5152 of the Revised Statutes is as follows: —

"Persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner, and to the same extent as the testator, intestate, ward or person interested in such trust funds would be if living and competent to act and hold the stock in his own name."

This provision was borrowed almost word for word from Chapter 98 of the Acts of Massachusetts of the year 1838, which is as follows: —

"SECTION 1. *No persons holding stock in any corporation, as executors, administrators, guardians or trustees, shall be personally subject to any liabilities as stockholders of such corporation; but the estates and funds in the hands of such executors, administrators, guardians and trustees, shall be liable in their hands in like manner, and to the same*

extent, as the deceased testator or intestate, or the ward or person interested in such trust fund would have been, if they had respectively been living and competent to act, and had held the same stock in their own names; provided, that this act shall not be construed to affect or impair any right heretofore acquired by any person against a holder of stock in any corporation by force of the laws of this Commonwealth, but all existing liabilities of such stockholders, under any preceding act, shall be adjudged and determined upon as if this act had not been passed.

"SECT. 2. Every such executor, administrator, guardian and trustee shall represent the shares or stock in his hands at all meetings of the corporation, and may vote as a stockholder.

"SECT. 3. *In all transfers of stock in any corporation hereafter made as collateral security, the debt or duty which such transfer is intended to secure shall be substantially described in the deed or instrument of transfer; and any certificate of stock, which shall be issued to any pledgee or holder of such collateral security, shall express, on the face of it, that the same is so holden; and the name of the pledger shall be stated therein, and he alone shall be responsible as a stockholder in said corporation.*

"SECT. 4. It shall be the duty of the treasurer or cashier, or of any other officer who has the lawful custody of the records of transfers of shares in any corporation, upon the written request of a creditor of the general owner of any stock pledged or transferred as aforesaid, to exhibit to him the record of such transfer; and in case of refusal, and of any loss to such creditor by reason thereof, such corporation shall be liable to said creditor for the amount of such loss."

Comparing the provisions of Section 5152 of the Revised Statutes quoted above with this Massachusetts Statute it will be seen that having borrowed the provision exempting executors, administrators, guardians and trustees, Congress stopped short and omitted the rest of the Massachusetts law, which provided for the exemption of a pledgee from liability.

It therefore seems obvious that Congress did not intend to exempt pledgees, whose names appeared on the stock

register, from liability as shareholders, but left them liable as such in accordance with what was a perfectly well-settled rule of law. We have already shown that the liability had been perfectly well established at that time, and must have been thoroughly familiar to the framers of the act, who, if they had intended to exempt pledgees from it, would have included them in the excepted class along with executors, administrators, guardians and trustees, as was done in the Massachusetts Act from which they borrowed the exemption.

It appears from the insertion of this exemption that Congress considered that by Section 12 of the Bank Act the stock register had been made the test of the liability and not the equitable ownership of the shares; otherwise the exemption of executors, administrators, guardians and trustees would have been unnecessary.

The reason why Congress did not see fit to exempt pledgees is obvious. It felt that the whole of the capital stock should bear the liability, that this liability should be readily ascertainable and easy to enforce. There was no difficulty in exempting executors, administrators, guardians and trustees from personal liability, since the estates in their hands could be readily rendered liable, and it was a great hardship to cast upon such persons, having no beneficial interest in the stock, so heavy a burden; but the pledgee does have a beneficial interest in the stock, and it was the policy of Congress that he should suffer rather than that the creditors should be put to the burden of inquiring into equities existing between the registered owners and third parties.

VI.

We submit in conclusion that it appears plainly from what we have thithero said concerning the language of the statute, the history of the law, and the authorities, that, subject to the express exceptions named, the person liable for an assess-

ment is the registered holder, no matter what his actual interest in the stock may be, and that the reason is not solely that he has held himself out as the real owner, and is therefore estopped to deny his liability as owner, but he is made liable so that the assessment may be easy of collection and free from the embarrassment to the receiver of bringing in conflicting claimants and settling questions of equitable ownership.

EDWARD W. HUTCHINS,
HENRY WHEELER,
for THOMAS P. BEAL, *Receiver*.

165-606

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JAMES H. McKENN
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165-606

BRIEF OF DEFENDANT IN ERROR.

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1894.

No. ~~800~~.

Frederick N. Pauly, Receiver of the California National Bank of San Diego,

Plaintiff in Error,

vs.

The State Loan and Trust Company.

Defendant in Error.

497

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

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Los Angeles, Cal.
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Filed ..... *1895.*

..... *Clerk.*

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(15,750.)

(15,750.)

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1894.

No. 866.

Frederick N. Pauly, Receiver of the California National Bank of San Diego,

Plaintiff in Error,

vs.

The State Loan and Trust Company.

Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

At page 24 of the transcript herein appears the opinion of the honorable Circuit Court of Appeals in this cause, wherein that court sets forth the statement of the case in the following language:

"The opinion of the judge who decided this case in the "Circuit Court contains the following accurate and concise "statement of the case and of the question at issue:

"'The plaintiff, as receiver of an insolvent national bank, "brings this suit against the defendant bank to recover the "amount of an assessment on two hundred shares of the "stock of an insolvent bank originally taken by the defend- "ant as collateral security for $12,500, with interest thereon, "loaned by defendant to J. W. Collins and S. G. Havermale, "upon that security and upon the promissory note of Hav- "ermale endorsed by Collins. At the time of the loan, Col- "lins was president and Havermale one of the directors of "the California National Bank of San Diego, and each was "registered owner and holder of one hundred shares of its "stock. The bank was then carrying on its ordinary busi- "ness, and, so far as known to the defendant and the public, "was perfectly solvent. Upon the making of the loan, and "for the purpose of securing its repayment, with interest, "Collins and Havermale each endorsed in blank his certifi- "cate for one hundred shares of the stock in question to "defendant, and thereupon, and upon the application of the "defendant to the bank whose stock was thus represented "and assigned, that bank took upon the two certificates "issued to Collins and Havermale, and in lieu of them issued "to the "State Loan & Trust Company of Los Angeles, as "pledgee," two certificates for one hundred shares each.'

"The defendant thus stood upon the registry of the "national bank as the holder of two hundred shares of its "stock 'as pledgee,' and so stood at the time the bank "became insolvent. The indebtedness to defendant, for "which the stock was given as security, though reduced in "amount to $10,000, continued, and the question presented "for decision is, whether under such circumstances defendant "is liable for an assessment upon the two hundred shares of "stock for the benefit of the creditors of the insolvent bank. "The statute providing for the association of persons for "carrying on the business of banking, provides, among other "things, as follows:

"'The capital stock of each association shall be divided "into shares of one hundred dollars each, and be deemed

"personal property and transferable on the books of the "association in such manner as may be prescribed in the "by-laws or articles of association. Every person becoming "a shareholder by such transfer, shall, in proportion to his "shares, succeed to all rights and liabilities of the prior "holder of such shares; and no change shall be made in "the articles of association by which the rights, remedies or "security of the existing creditors of the association shall be "impaired.'

"Revised Statutes, section 5139.

"By section 5151 of the Revised Statutes, it is declared:

" 'The shareholders of every national banking association "shall be held individually responsible, equally and ratably, "and not one for another, for all contracts, debts and "engagements of such association, to the extent of the "amount of their stock therein, at the par value thereof in "addition to the amount invested in such shares;' with cer- "tain exceptions not applicable to the present case.

"Section 5152 is as follows: 'Persons holding stock as "executors, administrators, guardians or trustees, shall not "be personally subject to any liabilities as stockholders, but "the estates and funds in their hands shall be liable in like "manner, and to the same extent as the testator, intestate, "ward or person interested in such trust funds would be if "living, and competent to act and hold the stock in his own "name.' "

The Circuit Court, Honorable Erskine M. Ross presiding, gave a judgment in favor of the defendant. That judgment was affirmed upon appeal by the honorable Circuit Court of Appeals, from which latter court the present appeal is taken to this court. The opinion of the Circuit Court awarding judgment in favor of the plaintiff appears at page 14 of the printed transcript herein, while that of the Court of Appeals affirming the judgment of the Circuit Court appears at page 24 of the printed transcript herein.

A glance at those two opinions, or at the adjudications upon which they are based, wtll conclusively show that,

considered either in the light of the previous adjudications of this court or in the light of a proper interpretation of the statute upon which this action is brought, the judgment of the Circuit Court herein, as affirmed by the Circuit Court of Appeals, should now be again affirmed by this court.

The Circuit Court of Appeals, in affirming the judgment of the Circuit Court herein, used the following language:

"The Circuit Court gave a judgment in favor of the "defendant, and the plaintiff has brought the case to this "court by writ of error.

"The decision of the Circuit Court, as appears by said "opinion, was placed upon the ground that the defendant "was not in fact owner of the stock, and as the stock regis- "ter showed that it held the same merely as pledgee, there "was no estoppel. Counsel for plaintiff in error controverts "these conclusions, contending that a pledgee of stock is the "legal owner thereof; that the register, by showing the "defendant to be the holder as pledgee, showed it to be the "legal owner, having the legal rights and subject to all the "legal liabilities incident to ownership.

"We think, however, that the error is in the argument of "counsel, rather than in the decision of the court. By "delivery of a pledge as security for the payment of a debt, "the pledgee acquires only a lien or special property in the "article or things pledged. [Story on Bailments, ss. 287, "307; 18 Am. & Eng. Enc. 590.] Even where in lieu of "delivery an apparent transfer of title is made for the pur- "pose merely of security, the general property remains in "the pledgor.

"18 Am. & Eng. Enc. 591, note;

"Cross *v.* Eureka, etc., Canal Co., 73 Cal. 302."

The honorable Court of Appeals by the foregoing quotation declared that upon principle (independent of former adjudications of this court) the decision of the Circuit Court herein was correct and should be affirmed by the Court of Appeals; but in the closing paragraph of its opinion the Circuit Court of Appeals [see page 25, printed

transcript herein] approves the opinion of the Circuit Court herein, wherein it is declared that the decision of the Circuit Court herein is not only supported by a proper interpretation of the statute under which the action was brought, but is also supported by a previous adjudication of the Supreme Court of the United States.

The Honorable E. M. Ross in deciding this cause in the Circuit Court used the following language: [See page 15, printed transcript herein.]

"*In my opinion, the doctrine of the case of Anderson v. Ware-*
"*house Co., 111 U. S. 479, 4 Sup. Ct. Rep. 525, carried to its*
"*logical conclusion, exempts the defendant from the liability*
"*with which it is sought to be charged.* In that case the
"Supreme Court, while declaring it to be settled that one
"who allows himself to appear on the books of a national
"bank as an owner of its stock is liable to the creditors as a
"shareholder, whether he be the absolute owner or pledgee
"only, and that, if a registered owner, acting in bad faith,
"transfers his stock in a failing bank to an irresponsible
"person, for the purpose of escaping liability, or if his
"transfer is colorable only, the transaction is void as to
"creditors, and that it is also true that the beneficial owner
"of stock registered in the name of an irresponsible person
"may, under some circumstances, be liable to creditors as
"the real shareholder, said it knew of no case that held that
"a mere pledgee of stock is chargeable where he is not reg-
"istered as owner. * * *

"*It seems to me there was stronger ground for holding the*
"*warehouse company liable in the case from which the quota-*
"*tion has been made than there is for holding the defendant in*
"*the present case liable.* Here it is not pretended that there
"was any fraudulent conduct on the part of the defendant.
"There that claim was made, and it constituted the ground
"of the dissenting opinion of two of the justices of the court.
"*If the holding of the stock as pledgee rendered the warehouse*
"*company liable under the statute, it could not have relieved*
"*itself of that liability by causing the stock to be placed upon*

"the books of the bank, and a certificate therefor to be issued in "the name of one of its irresponsible employes; for the same "case declares it to be well settled that a liability incurred can "not be so avoided. The warehouse company was without any "liability, because, being pledgee only, it was not the real owner "of the stock, and it was not liable as the apparent owner "because it did not appear upon the records of the bank as such "apparent owner, and hence no one could have been misled by "its acts.

"Applying this reasoning to the case at bar, the defendant "bank must be held not liable. If, as held in Anderson v. "Warehouse Co., a pledgee is not liable because not the real "owner of the stock, it is manifest that the record of the truth "upon the books and certificate of the bank that the stock is held "in pledge cannot render such pledgee liable. Any and every "person dealing with the bank is thereby apprised that the "pledgee only holds the stock as security for some debt or "obligation, and that the real owner of it is the pledgor, to "whom he must look for the statutory liability.

"It results that there must be judgment for the defend-"ant and it is so ordered."

Viewed in the light of the foregoing opinion, the reasoning of the court set forth therein, and the decision of the Federal Supreme Court referred to and analyzed therein, an apology should be made to this court for further prolonging this brief.

It will be noted that in Anderson *v.* Phila. Warehouse Co., *supra.*, the bank stock was transferred to T. Carleton Henry, president of the bank that took it as collataral security for debts of the pledgor to that bank, and that there was—we quote from the opinion of the chief justice—"a new certificate issued in the name of T. Carleton Henry, "president," and "sent to the warehouse company as fur-"ther security for the credit extended to Blumer & Co." During the next month "the fact of the transfer of the stock " to the name of Henry, president, was brought to the "attention of some of the directors and members of the execu-

"tive committee of the Warehouse Company. At once it "was deemed inadvisable to have the stock stand in the "name of the president, and the certificate was, on the 3rd "of January, transferred under the seal of the company "and the signatures of its president and secretary, to Denis "McClosky, an irresponsible person and a porter in its "employ. * * * "

That this transfer to the irresponsible porter would have been fraudulent if the bank was by such transfer in fact evading any liability which would properly attach to it as pledgee is apparent from the reasons given for this transfer in the letter written by President Henry to William H. Blumer set forth in the opinion of the Supreme Court. We find in that letter this language, "the failure of one or "two national banks lately led our directors to consider the "clause in the national bank act, which renders all stock- "holders liable in case of failure to pay up to the receiver "the full amount of the stock in their name; and on this "account we determined to have the certificates of national "bank stock put in the name of Dennis McClosky, who is "the boy in our office, taking his power of attorney to trans- "fer the same."

"McClosky never had possession of the certificate, and, "at the request of the warehouse company, executed in "blank, as of the date of January 3, an irrevocable power "of attorney for the sale and transfer of the stock. He "died in 1875. After his death the stock was transferred "on the books of the bank, at the request of the company, "to Francis Ferris, another *employe*, and also an irresponsi- "ble person. * * * *The transfer of Kern, Blumer & "Co. was only by way of pledge.*"

The warehouse company, for several years before the failure of the bank, "had possession of the certificates "which represented the stock, with full power to control "them for all the purposes of its security, but there never "was a time, from the date of the original transfer by Kern "on the books until the failure of the bank, that it was or

"pretended to be anything else than a mere pledgee. * * "As between the company and the bank or its creditors, "the company was a plegee of the stock and liable only as "such."

It is apparent from the foregoing words of the chief justice in the Anderson case that if the contention of plaintiff in error herein be correct, namely, that a pledgee is not a trustee, but an owner, and liable as such, there were two distinct grounds, either one of which would have made the warehouse company liable and either one of which would have changed the decision of the federal Supreme Court, namely, first, the warehouse company having had possession of the stock as collateral security, and holding it as pledgee, it was for that reason liable as owner according to the contention of plaintiff in error herein, and, secondly, if such liability should have attached to it as pledgee, the warehouse company would have been liable for an additional reason, namely, because of its fraud in attempting to evade that liability by transferring the stock to the irresponsible porter.

But the Supreme Court declared the company not liable on the first of those two grounds, because, in its opinion the pledgee was a trustee, not an owner, under the provisions of the statute, and held it not liable on the second ground, because, since no liability attached to it as pledgee, it had no liability to evade, and it was therefore not a fraud to transfer the stock to an irresponsible person, to avoid assuming a liability by holding the stock; as it had theretofore been held in the name of the bank or its president as owner, whereas, the bank was in fact merely pledgee. The warehouse company as pledgee was not liable. But letting the stock stand as at first issued, in the name of its president as apparent absolute owner without the use of the word pledgee, either the company or its president would have been by the registry estopped to deny the absolute ownership which it had thus apparently assumed, and would upon that ground have been liable. Neither the

provisions of the law nor the obligations of good faith required it to assume by such registry an obligation which the true character of the holding did not impose. It was under no obligations to register either itself or its president as owner, because neither the bank nor its president was owner. It had two methods to pursue in order to avoid assuming the liability which would upon grounds of estoppel attach if it had allowed itself or its president to stand upon the registry as absolute owner contrary to the true facts as to the ownership.

Not being an owner, but being merely a pledgee, it had the option to register itself as pledgee in accordance with the facts, and thus avoid assuming a liability, or to register it in the name of the irresponsible person. It chose the latter course, and its action was declared not fraudulent. That declaration is absolutely inexplicable, except upon the assumption that because no liability would have attached if the true facts—namely, that the stock was held in pledge —had appeared upon the register, there was no liability to evade by registry in the name of the irresponsible person, and the false registry was therefore harmless, and in consequence was not fraudulent. We therefore repeat the language of the honorable circuit judge who tried the case at bar: "There was stronger ground for holding the warehouse company liable in the case from which the quotation has been made than there is for holding the defendant in the present case liable."

A simple reference to either the opinion of the trial court in this cause, [page 14 transcript herein] or to the opinion of honorable Circuit Court of Appeals in this cause, [See printed transcript herein, page 23,] or to that of the United States Supreme Court in the case of Anderson *v.* Philadelphia Warehouse Co., reported in 111 U. S., page 479, presents an unanswerable argument in favor of defendant in error herein, or we might with full confidence present a mere copy of section 5152 of the U. S. Revised Statutes, as defendant's brief herein.

In Anderson *v.* Phila. Warehouse Co., 111 U. S. 478, defendant warehouse company was by U. S. Supreme Court declared not liable as stockholder, and in so holding the learned court use this language:

"*It has never to our knowledge been held that a mere pledgee of stock is chargeable where he is not registered as owner.* * * * There never was a time * * * that it [the defendant company] was or pretended to be anything else than a mere pledgee. * * * As between the company and the bank or its creditors the company *was a pledgee of the stock, and liable only as such.*"

Again the learned court in the same opinion, referring to the same company which was, in the above language, declared to be a *pledgee*, uses this language:

"*The warehouse company never was the owner of the stock.* * * * The transfer of K. & B. & Co. was only by way of pledge and the company was bound to return the stock whenever the debt for which it was held should be paid."

While it is true that the stock in the case from which we quote was at request of the pledgee for its own security placed on the books of the bank in the name of an irresponsible person, and not in the name of the pledgee as such, the opinion itself and above quotations from it constitute a clear-cut declaration by the Supreme Court that a pledgee of stock is not liable as such.

When the court in terms declared that as between the company and the bank or its creditors the company was a *pledgee of the stock and liable only as such*, and in the same opinion affirmed a judgment holding that company *not liable* at all, the court's expression "pledgee of the stock and liable only as such," taken in conjunction with the conclusions of the court, clearly indicate the reasoning and opinion of the court against the liability of a pledgee.

The language used, coupled with the conclusions of the court, becomes equivalent to the following—the company was pledgee of the stock and liable only as such, therefore, not liable at all.

The court in support of its conclusion that the company

was not liable at all, stated, "the company was a pledgee "of the stock and liable only as such."

What other construction can be placed on the language than this—the warehouse company was not liable because "it was a pledgee of the stock and liable only as such." But since a pledgee as such is not subject to such liability as that sued upon by the receiver, the warehouse company is therefore not liable. It will be noted that the liability charged by the receiver in the Anderson case is exactly the same as that charged herein.

Again, the language of Mr. Chief Justice Waite in the Anderson case: "It *has never to our knowledge been held that* "a mere pledgee of stock is chargeable where he is not *registered as owner.* * * * *The warehouse company never was the owner of the stock.* * * * *The company* was a pledgee of the stock;" must be construed to mean that registry as pledgee is not registry as owner, and therefore that defendant in the case now on trial was not registered in such form as to create any liability by reason of the registry.

Defendant in case now at bar was registered only as pledgee. But the court in the Anderson case says a pledgee is not an owner, therefore defendant herein having been registered as pledgee was not registered as owner.

It is clear then that when the court in the Anderson case said it has never been held that a mere pledgee of stock is chargeable when he is not registered as owner, the language of the chief justice, "registered as owner" was intended to mean registered absolutely as owner without the qualification "pledgee" appearing upon the record. Such conclusion is apparent from the other *declaration in the same opinion that a pledgee is not an owner.*

Again; *if to register as pledgee would create a liability it would have been a fraud for the warehouse company in the Anderson case to register the stock in the name of an irresponsible person as was in fact done instead of in the pledgee, and that company would have been held liable on the ground of fraud.*

But the Supreme Court declared that the warehouse company was a pledgee and was therefore not liable.

It is evident from the opinion that the conclusion of the court in the Anderson case would not have been changed if the stock had been registered in the name of the warehouse company as pledgee—which the court declared was its actual capacity—instead of in the name of an irresponsible person.

The court in specific terms declared that "the company "was a pledgee of the stock, and liable *only* as such," and while using the foregoing language affirmed a judgment holding the company not liable at all.

From the other language above given the same conclusion as to the mind of the learned chief justice is apparent. In affirming the judgment against the warehouse company's liability, the court gave as a reason for such conclusion the fact that that company never "was or pretended to be any-"thing else than a mere pledgee," and said also, "*It has never been held that a mere pledgee of stock is chargeable.*"

If in its actual capacity as pledgee, the warehouse company might have incurred liability by registering the stock in accordance with the facts, it could not evade such liability by registry in name of an irresponsible person.

Mr. Justice Shiras, in Wells *v.* Larrabee, 36 Fed. Reporter, page 870, declared that "it is well settled that the actual "owners of the corporate stock cannot shield themselves "against such liability by putting the stock in the name of "some irresponsible third party."

From the foregoing the conclusion is inevitable that if a pledgee is liable under any circumstances, the company should have been held liable in the Anderson case, and that the declaration in that case that the company was not liable is equivalent to a declaration that a pledgee is not liable under any circumstances.

Again, the chief justice in the Anderson case used this language: "If inquiries had been made and all the facts "ascertained, it would have been found that either K. or B

"& Co. were always the real owners." Apply that language to the case on trial. It is absolutely apparent that inquiry at the bank would have elicited the names of the real owners. The bankers all knew the facts, and the certificate stubs showed the ownership; and the word "pledgee" itself put persons on inquiry.

It was said by Mr. Justice Shiras, in Wells *v.* Larrabee, 36th Fed. Rep. 871, "The word 'trustee' to the name of Lar-"rabee upon the stock certificate was sufficient to charge "parties with notice that he held the stock not as his own "but as a trustee."

It follows from the foregoing that the word "*pledgee*" imparted notice of the character of defendant's holding in the case on trial.

In Wells *v.* Larrabee, 36 Fed. Rep., at page 866, the court declared that

"*In enforcing the liability the first principle recognized is that the actual owner of the stock may be held* liable for the assessment upon the shares owned at the time of the failure of the corporation. This, upon the principle that the parties who by reason of being the *actual* owners of the stock are entitled to the profits, * * * and must respond to the burdens and debts up to the statutory limit. In the enforcement of the liability * * * the *actual owners* of the corporate stock cannot shield themselves."

But in the Anderson case, *supra*, the Supreme Court declared that a pledgee is not an owner, using this language:

"*The warehouse company never was the owner of the stock in question, and never held itself out as such.* * * * *It never was or pretended to be anything else than a mere pledgee.* * * * As between the company and the bank or its creditors, the company was a pledgee of the stock and liable only as such. * * * It follows that the judgment of the Circuit Court [which declared the pledgee not liable] was right, and is consequently affirmed."

We submit that the principle declared in the Larrabee case, and therein emphasized by repetition, that the liability attaches only to the *actual owner*, and again declared by the Supreme Court in the Anderson case, coupled with the declaration in the latter case that a pledgee is not an owner,

and has never been held liable unless registered as an owner, is conclusive against the plaintiff in this cause, and is in keeping with not only the letter but with the very spirit and intent of the statute, namely, to hold liable to creditors the persons who are the real actual bankers, the persons who actually through the entity of the corporation contract the debt sued on, and not to hold responsible that other class of persons who have only a temporary possession of shares of the stock, with special property interest therein in the nature of liens for special purposes only, but who are not the actual bankers, who are not the owners and can not become the owners of the stock except by making the particular kind of a sale which the owner has authorized them to make for him, and which sale must be accompanied by an application of the proceeds to the payment of the debts secured.

To assert that congress intended to determine the question of liability as between pledgor and pledgee by the mere naked technicality as to where the legal title stands, without regard to the purpose for which such legal title may be held in trust by the pledgee, is not only contrary to the letter but contrary to the evident intent of the statute.

Again, we submit that "the liability sought to be enforced "is *purely statutory*." [Wells *v.* Larrabee, 869.] But the statutory provision is in itself against plaintiff's contention herein. Section 5151 of the Revised Statutes provides that the "*shareholders*" shall be responsible, while section 5152 provides that *trustees* shall not be liable.

We submit that defendant herein is not only not made liable by section 5151 Revised Statutes, independent of section 5152, but that it is affirmatively excluded from liability by the provisions of section 5152.

That section provides that "persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liabilities as stockholders."

A Pledgee is a Trustee, and as Such is by the Statute Exempted from Liability.

Throughout the doctrine of trusts, wherever discussed in any of the books, the principle prevails that wherever either the legal title, possession or control of the property of one individual is held by another, there exists a trust. It is therefore immaterial to this controversy whether the legal title of pledged property passes to the pledgee or remains in the pledgor. Certain it is that wherever the legal title may be, the pledgor still has an interest in the trust property. In the largest and most important class of trusts known to the law, namely, trusts created by the execution of trust deeds of real property,

the legal title of the property in question is vested in the trustee.

Flint in his recent work on Trusts and Trustees, at page two says:

"A trust means an obligation under which a person, in "whom property is vested, is bound to deal with, or to "supervise the dealing with, the beneficial interest in that "property in a particular manner and for a particular pur- "pose, either wholly in favor of another or others, or par- "tially in favor of another or others, conjointly with him- "self."

It is apparent from the foregoing that a trustee may, in the language of that author, hold either wholly in favor of another or "*partially in favor of another conjointly with himself*," therefore, the fact that a pledgee has an interest, a special property therein as defined by the books, makes him none the less a trustee, because, certain it is that the pledgor has likewise an interest—an interest greater than that of the pledgee, because the entire interest of the pledge must be applied for the benefit of the pledgor.

But not only in the text books and adjudications of law, but in all the dictionaries, either law or general, the word pledge is defined as it is by the California code as a mere deposit, whereas the word deposit is specifically defined to

mean a trust. Again, the word pledge is deemed to imply bailment, and the word bailment is defined to mean a trust. Again, the word trust is defined by Worcester and others to mean "something committed to one's charge for use or for "safe keeping, or of which an account must be given; a "deposit; * * * (law) an estate or any property held "and managed for the benefit of another (Burrill)."

The proposition that a pledgee must give an account of the pledged property needs no argument to support it.

That a pledge is defined throughout the books as a deposit and therefore comes within the definition of trust quoted by Worcester from Burrill is equally clear.

Webster expressly defines the word pledge as a trust, a species of bailment. The same author then defines the word bailment as a delivery of goods in trust. He likewise defines a pledge as a deposit and then defines the word deposit as something entrusted to the care of another in trust or for safe keeping, and then defines the word depositary as a trustee.

Bouvier in his law dictionary defines the word "pledge" as "a *bailment* of personal property as security for some "debt or engagment." But that a bailment is a *trust* will clearly appear from the following definitions of the word "*bailment*."

"*Bailment*—a delivery of a thing *in trust* for some special "object or purpose, and upon a contract, express or implied, "to conform to the object or purpose of the trust." [Story "Bailments" Sec. 2.]

"A delivery of goods *in trust* upon a contract, express or "implied, that the *trust* shall be duly executed, and the "goods restored by the bailee as soon as the purposes of the "bailment shall be answered." [2 Kent Com. 559.]

"A delivery of goods *in trust* on a contract, either ex-"pressed or implied, that the *trust* shall be duly executed "and the goods redelivered as soon as the time or use for "which they were bailed shall have elapsed or be performed." [Jones on Bailments, 1.]

"A delivery of goods *in trust* on a contract, expressed or "implied, that the *trust* shall be duly executed, and the "goods redelivered as soon as the time or use for which "they were bailed shall have elapsed or be performed." [*Id.* 117.]

"A delivery of goods *in trust* upon a contract, express or "implied, that the *trust* shall be faithfully executed on the "part of the bailee." [2 Blackstone Com. 451.]

In Ordronaux' "Constitutional Legislation," in chapter 12, which is entitled, "Words of Common Use in Statutes and their Judicial Meaning," we find this language on page 636:

"Trust means in law a right in property, real or personal, "held by one person for the benefit of another. The legal "title rests in the trustee, the equitable in the beneficiary." This language describes the position and obligations of a pledgee.

Pomeroy's Equity, section 149, contains a discussion of the legal principles resulting from the separation of the legal and equitable titles in cases of trust.

That author says: "From the universality of this double "ownership, or separation of the legal and equitable titles "between two proprietors or holders, which is an essential "feature of trusts, all species of equitable estates and interests "might possibly be regarded as particular kinds of trusts, or as "special applications of the general principles concerning "trusts. * * * Still, in this form of double ownership, "or right, originated the notion of trusts, and as all the spe- "cies of equitable interests are connected by analogy, more "or less closely, with trusts, it becomes necessary to explain "the essential nature of trusts, and to describe the introduc- "tion and development of their conception with some "detail." [Section 149.]

"The purely equitable estates and interests which come "within the exclusive jurisdiction and constitute the first "branch thereof, are the following, separated, for purposes "of convenience as to treatment, into general groups: trusts,

"married women's separate property, equitable interests "arising from the operation of the doctrine of conversion, "equitable estates or interests arising from mortgages of real "or of personal property, *and from pledges of chattels or securities.*" [*Idem*, section 150.]

The leading text book writers upon the subject of pledges declare that:

"*All collateral security, of whatever it may consist, is held in "trust.*"

Jones on Pledges, section 393.

"Upon this subject the code of Louisiana well expressed, "not only the civil law but the common law as well, upon "the subject. It declares that until the debtor be divested "of his property he remains the proprietor of the pledge." [*Idem*, section 393.]

"Again, if one receives a conveyance of lands or other "property absolute in form, but really as security for a debt, "he will hold the legal title in trust for the grantor after the "payment of the debt, and before a reconveyance. So if "one receives personal property, agreeing to hold it for "another, or to sell it and pay the proceeds to the holder of "a note, draft, or other debt, he becomes a trustee, and a "bill in equity may be maintained against him and his "pledge to enforce the trust."

Perry on Trusts, section 243.

The California Supreme Court in Cross *v.* Eureka Lake, etc., 73 Cal. 302, declared that a pledgee was not the owner. The pledgee, of course, has a lien on the stock, but a lien transfers no title to the property. [C. C. Cal. 2888.]

Again, by the very terms of the Civil Code, section 2986, which merely expressed the doctrine of the common law on this particular subject, a pledge is merely "a *deposit* of prop-"erty by way of security." The Court of Appeals in this case declared that whether considered in the light of general law or in the light of the California statute, "the gen-"eral property remains in the pledgor." [See printed transcript, page 25.] And see Jones on Pledges, page 1, to same

effect. Likewise see abundant authority to same effect cited elsewhere herein.

But a "*deposit*" at common law, and by the terms of section 1814, Civil Code is "made by one giving to another "with his consent the *possession* of personal property to "keep for the benefit of the former," etc.

"The law is well settled, where there is no agreement otherwise, the pledgee in possession takes only a lien on property as a security, and is bound to keep the pledge and not use it to its detriment, and to redeliver it on payment of the debt. His character is that of a trustee for the pledgor, to return the property if redeemed, and if not redeemed, then first to pay the debt, and second, to pay over the surplus, and he cannot so deal with the trust property as to destroy or even impair its value." [See Wheeler *v.* Newbold, 16 N. Y. 393.]

Union Trust Company *v.* Rigdon, 93 Ill. 458, (Language quoted from page 465.)

See also Felton *v.* Brooks, 4 Cush. 203.

"If regarded as a pledge, it is more in the nature of a trust than if regarded as a mortgage. The principal reason assigned for not regarding a mortgage as strictly a trust is, that the mortgagee has a property in the thing which he may make absolute in case the condition is not performed, by foreclosing the right of redemption. But the pledgee cannot do this. If the debt or duty is not discharged, he must avail himself of the security by selling the thing pledged, and not by foreclosure, and he holds the avails of the sale in trust to discharge the debt or duty, and, if any balance remains, to pay it to the pledgor."

Newton *v.* McFay, 10 Allen, page 507.

A reference to page 510 and 511 of this case will convince the reader that the Massachusetts court regarded the law as well settled to the effect that a pledgee is a trustee.

See also Easton *v.* Germ. Am. Bank, 127 U. S. 532, (Law. Coop. Ed. Bk. 32, p. 210) in which this language is used on page 212:

"By virtue of the pledge, the pledgee has the right by law, on the default of the pledgor, to sell the property pledged in satisfaction of the pledgor's obligation. As in that transaction the pledgee is the vendor, he cannot also be the vendee. In reference to the pledge and to the pledgor, he occupies a fiduciary relation, by virtue of which it becomes his duty to exercise his right of sale for the benefit of the pledgor. He is in the position of a

trustee to sell, and is by a familiar maxim of equity forbidden to purchase for his own use at his own sale."

A pledgee does not own the stock which he holds to secure a debt due him.

See Cross *v.* Eureka Lake, etc., Canal Co., 73 Cal. 302. (2 Am St. Rep. 808.)

This was a suit to recover dividends on stock. 750 shares were deposited with Sigourney to secure a debt due him. Sigourney's administrator brought suit for dividends. *Held*, that as pledgor had assigned dividends plaintiff could not recover. Defendant had judgment and plaintiff appealed. In the same case on page 306 of 73 Cal., the court uses this language: "It is also claimed that when the "certificate for the 750 shares was issued to Sigourney, he "became the owner of the legal title to the stock, and that "that title must prevail here, this being a mere action at "law. This claim cannot be maintained. *Sigourney was "only the pledgee of the stock, and as between him and the "pledgor the general property remained in the latter.*"

Sec. 2888 Cal. C. C. provides that a lien transfers no title to the property which is subject to the lien.

The contract of pledging is nothing more than the creation of a lien upon the property pledged.

In Dewey *v.* Bowman, 8 Cal. 145, we find this language on page 151:

"The pledgee has a *lien upon*, not the legal title to, the property. It is taken as security and the legal title remains in the pledgor. If any loss occurs it falls upon him. If the debt to secure the payment of which the pledge is made, be not discharged when due, the pledgee does not obtain an absolute title to the property. He then has a right to sell the pledged property, and pay himself from the proceeds."

In Hyatt *v.* Argenti, 3 Cal. 151, the court uses this language, (p. 163):

"These decisions are based upon the principle that where personal things are pledged for the payment of a debt, the *general property and the legal title always remain* in the *pledgor;* the *special property and the possession* or right of possession, being in the pledgee; the pledgor having the right to restoration of the property on payment of the debt.

"In the cases of the transfers of stock the courts say, that the *special property* only passed; that the contemporaneous paper, or note in writing, showed that the transfer, although absolute on its face, did not convey the *general* property or the *legal title* to the property, but it was resorted to from necessity, arising from the by-laws of the corporation of whose capital stock these shares were a part, which required the transfer of the certificate to be made upon their books, and that this absolute transfer was necessary to give the creditor possession of the stock, and for his own protection."

To the same effect see—

Heyland *v.* Badger, 35 Cal. 404, (see pp. 404, 414;)

Brewster *v.* Hartley, 37 Cal. 15, (see p. 25);

Lucketts *v.* Townsend, 3 Texas 119, (49 Am. Dec. 723,) (see p. 725 of 49 Am. Dec.);

Wright *v.* Ross, 36 Cal. 414, (see p. 428);

Cook on Stockholders, Sec. 463;

Parsons on Contracts, Vol. 1, p. 569, Vol. 2, p. 113, Vol. 3, p. 272.

In further support of our position that the pledgee is not the owner of the stock we refer to those provisions of the law which prohibit the pledgee from exercising certain important acts of ownership over the pledged stock. For instance, the right to vote the pledged stock rests not with the pledgee but with the pledgor. See the following authorities:

Cook on Stockholders, Sec. 468;

Morawetz on Priv. Corp. Sec. 483;

Jones on Pledges, Secs. 441, 442;

Lawson's Rights, Rem. & Practice, Vol. 4, p. 3009, Sec. 1761.

In the case of Hoppin *v.* Buffam, 9 R. I. 513, (11 Am. Rep. 291,) on page 293 of 11 Am. Rep., we find this language:

"A person who pledges stock has the right to vote upon it until the title of the pledgee to the stock is perfected."

See also *In re* Jacob Barker, 6 Went. 509 N. Y. Com. Law Rep. Vol. 10, p. 1177;

Ex parte Willcocks, 7 Cowan 402; 17 Am. Dec. 525. (See p. 528 of 17 Am. Dec.)

From the foregoing it appears that a pledgee is a trustee, and upon that ground defendant herein is by section 5152 of revised statutes relieved from liability.

That a pledgee is a trustee is evident from the foregoing definitions of a pledge. It appears clearly that both at common law and under statutory provisions a pledge is a mere *deposit*; that the pledgor remains the beneficial owner, while the pledged property is merely deposited. If merely deposited, it must upon elementary principles be held only in trust. If the absolute ownership does not pass, how can it be said that it is not held in trust?

The pledgee holds the stock not only in trust but directly for the benefit of the pledgor or debtor.

The pledgor or debtor negotiates a loan upon the stock and thereby directly secures the benefit. He places the stock in the hands of the pledgee, in trust, nevertheless, for the pledgor, and for a specified purpose, namely, to enable him to pay the debts of the pledgor. But the stock is not applied to the payment of the debt, and does not become the property of the pledgee or of the creditor while it remains in pledge.

To transfer the absolute ownership, another step besides the mere pledging is necessary. The pledgee must either sell the pledged property at public sale according to law, or he must in a court of equity foreclose the interest of the pledgor. Before these steps are taken the pledgee is not the owner. He cannot even procure the title by purchase at pledgee's sale. It requires a decree in equity to empower him to purchase the pledged property and thus acquire title to it.

The pledgee takes neither the legal title nor the absolute ownership, certainly not the latter. He takes merely possession, coupled with certain powers, namely, the power to proceed in accordance with the forms prescribed by law, either in court to procure a decree taking

the title from the pledgor through the instrumentality of a judicial sale, or proceeds at public sale as pledgee to dispose of the property by sale according to law to such third persons as may become buyers.

But pending these proceedings in court, or pending a public sale under the forms prescribed by law, the title and ownership of the stock remains in the pledgor; possession only, with perhaps what the books term a special property, remains in the pledgee, coupled with the specific powers above mentioned.

The pledgee cannot even procure title by purchase at the public sale except by the pledgor's consent, or by procuring a decree of court to that effect. But even this privilege of purchasing at the sale does not of right belong to the pledgee as such.

The pledgee has a mere privilege to cause the pledged property to be applied toward the payment of the pledgor's debt under the forms prescribed by law. He may have a special property right for that purpose only.

As the pledgor is presumed to intend to pay his own debt, it follows that even upon the sale, whether under decree of court or otherwise, the stock itself or its proceeds must be applied to the benefit of the pledgor, namely, to pay his debt legally contracted for which he chose to pledge his stock by delivering it into the possession of the pledgee. The pledgor is all the while, therefore, the beneficial owner. He is entitled to all the surplus, whether of proceeds or pledged property, after payment of his debt. Can it be said that an arrangement for the payment of an honest debt out of the debtor's own property is not an arrangement for the debtor's benefit?

We repeat, then, that upon the most elementary doctrine of trusts the pledgee holding something which does not absolutely belong to him, and for which he must account to another, is a trustee, and that upon the question as to whether or not he is a trustee within the meaning of the

federal revised statute, it is absolutely immaterial as to whether the pledgor or the pledgee holds the legal title.

Congressional Intent.

That the congressional intent, in the absence of deception from false registry, was to make the liability depend upon the question of actual, beneficial interest of the parties, and not upon the naked technicality of the legal title, without regard to actual ownership or beneficial interest, is a proposition too plain for discussion in this court.

Neither the federal congress nor the courts intend to permit an individual to represent himself upon the books of the bank as an actual owner of the stock, without designating upon those books the character of his holding, and to nevertheless escape liability to those creditors who were either actually deceived by such registry of stock, or who are constructively deemed to be deceived by such false registry. It is in such cases only that the apparent legal holder of the stock is liable without regard to his ownership, and it is such cases as above mentioned that are referred to in the decisions mentioned by counsel for plaintiff, wherein the liability is determined by the manner in which the stock is shown upon the books of the corporation.

The fact that the pledgee holds something which does not belong to him absolutely, and for which he must render an account, makes him a trustee, and the same conclusion is arrived at from an examination of the text books, on law, adjudications of courts or lexicons, as to the meaning of the words pledgee and trustee.

Again, the very language of the federal statute itself, indicates the congressional intent to make actual owners of the bank stock—those who are the real owners—liable for the debts contracted nominally through the instrumentality of the corporate entity, but in fact, contracted by the stockholders themselves, whom the corporation represents.

There is nothing in the language of the enactment showing any intention upon the part of congress to make an

individual liable who is not an actual owner of the stock, but holds it merely for some incidental purpose, unless such holder be registered upon the corporate books as absolute owner, or by other representations either deceives or is presumed to deceive the creditors into beleiving that he is the actual stockholder. Upon the contrary, there appears, from the statute itself, a clear cut intention to exclude such persons as hold the stock without owning it from all liability, so long as they do not represent themselves upon the books of the bank as owners.

The statute declares that the trust fund, if any, held by executors or administrators or trustees, shall be liable, but not the executors or trustees themselves. The evident reason for making the fund liable is that the actual beneficial owners of the fund are the actual beneficial owners of the stock, therefore, the liability is made to follow the ownership.

When the executors succeed the decedent as stockholder, the heirs or devisees succeed the decedent as owners; because the heirs and devisees are owners they are made liable to the extent of their funds in the hands of the executor stockholder. It is the estate of the decedent—the heirs or devisees—that in fact succeed the decedent as actual bankers and carry on the business of banking through the instrumentalities of the executors and the corporation. They are made liable because they are the real contracting parties. The executor is merely their representative as is the pledgee the mere representative of the pledgor. But the pledgee has even less control over the affairs of the bank than has the executor. The pledgee, for instance, without authorization from the pledgor is not entitled to vote the stock at corporate meetings; the executor does possess such power. But neither the pledgees nor the executors are the actual bankers.

There is no pretense by any one made that the pledgee as against the pledgor can deprive the latter of his interest in the stock, except only upon default in payment of the

moneys secured by the pledge. After default in payment of the moneys secured the pledgor cannot be deprived of his property rights except by a pledgee's sale under his powers as such, acting for the pledgor, or by a judicial sale under decree of court, and upon such sale the surplus proceeds of either property or money belong to the pledgor.

However profitable the business of the bank may become, however valuable its stock may become, the pledgee is not not entitled to receive back one cent in excess of the money loaned and interest thereon at the contract rate, and these amounts he receives not as profits of the banking business, but in payment of his customer's debt to which the pledgee is entitled without regard to the pledge. If the pledgee receives the proceeds of the sale or dividends of the stock he applies it to the payment of the pledgor's debt.

Reply to Plaintiff's Argument.

Plaintiff cites Watte *v.* Dowley, 94 U. S. 527, to the effect that the purpose of requiring a national bank to post in its banking house and transmit to the comptroller of the currency a list of its shareholders, is to furnish to the public dealing with the bank a knowledge of the names of its stockholders, and to what extent they may be relied on as giving safety to dealings with the bank. This is an argument outside the record; and even if it were in evidence that a correct list of shareholders had been duly posted and transmitted, this list in setting forth the name of defendant as "State Loan and Trust Company of Los Angeles, Pledgee," would have given to the public notice of the true character of defendant's holding, which was that of a trustee. Consequently, the public could not have been deceived, and could not have been induced to deal with the San Diego bank, relying upon the position of defendant as a stockholder.

In citing section 5139, Revised Statutes, plaintiff simply begs the question. That section, after prescribing the method of transferring shares of a national bank, provides

that "Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares." To make this provision applicable, plaintiff must show that defendant had become a "shareholder" in the San Diego bank, which is the very question in issue. Defendant's contention is that it never was a shareholder of the San Diego bank, and this contention is sustained by the authorities elsewhere herein cited. The same may be said of plaintiff's citation of Morse on Banks and Banking, section 679, which is to the effect that one who is registered upon the books of a corporation *as a shareholder*, will be held liable as such. The authorities elsewhere cited establish beyond doubt that, by registering its name as "pledgee," defendant did not register itself "as a shareholder," but so registered itself that its status clearly appeared to be not that of a shareholder. In the section cited, the author's conclusion is based on the ground of equitable estoppel, elsewhere herein discussed.

Plaintiff also cites Morse on Banks and Banking, section 680. An examination of the decisions upon which the text of this section is founded, will show that the author refers to one who appears upon the books of the bank as absolute owner of the stock.

The text of section 680 of Morse on Banks and Banking is based upon Moore *v.* Jones, 3 Wood 353, and Bowdell *v.* Farmers and Merchants' Nat. Bank, 14 Bankers' Magazine 387 (2 Nat. Bank Cases, p. 146). Moore *v.* Jones was decided upon the ground that the transfer there in question was absolute on its face, and that if defendants by accepting under such a transfer had held themselves out to the public as stockholders, they would not be permitted to evade the responsibilities incident to such a position.

Bowdell *v.* F. & M. Nat. Bank of Baltimore, 14 Bankers' Magazine 387, [2 Nat. Bank cases, 146] was decided upon the same ground. The transfer there in question was made as security for a loan. The pledgee returned the certificate

of stock to the pledgor with a power of attorney indorsed on the back of them, authorizing pledgor to retransfer the shares to himself. The court [p. 147 of 2 Nat. Bank Cases] says:

"But this [re-transfer] was never done, but the said stock continued to stand in the name of this defendant up to the time of the closing of the said First National bank of Norfolk, without anything on the face of the books of said bank to show that this defendant held the said twenty shares only as security for a loan, and not as the legal owner of the same,"

thus clearly basing its decision upon the grounds of equitable estoppel.

Plaintiff cites Cook on Stock and Stockholders, 3rd Ed. Sec. 247, in support of his contention that the transactions involved in the case at bar constituted defendant a shareholder of the San Diego bank. Section 247 is as follows:

"A pledgee of stock, that is, one to whom the stock has been transferred in pledge or as collateral security, and who has had the stock transferred into his own name on the corporate books, is liable to the creditors of the corporation as though he were the absolute owner of the stock. This rule has frequently been enforced in the case of a pledge of shares of stock in a national bank. If, however, the stock has been recorded on the corporate books, not in the name of the pledgee, but in the name of a 'dummy,' the pledgee is not liable thereon. A statute frequently relieves the pledgee."

This citation requires no comment. The language quoted refers to cases where the pledgee appears on the corporate books, as owner; and an examination of the cases cited in support of the text will show that the author could not have intended to convey any other impression.

The same may be said of plaintiff's citation of Morawetz on Corporations, section 852, which is to the effect that the *legal owner* of stock is liable to the corporation and to its creditors for corporation debts. The author states that this applies to trustees and to those who hold stock in pledge. But the citations adduced in support of this last proposition are of cases in which the pledgor and pledgee had caused the latter to appear upon the corporate books as the real owner of the stock.

In cases of Creese *v.* Babcock, 10 Met. 525, and Grew *v.* Breed, 10 Met. 569, which are cited by Morawetz in his notes to section last referred to, pledgees were held liable, although their status as such was made to appear on the face of the corporate books. An inspection of the opinions in those cases will show that the decisions were made in pursuance of the Massachusetts statute then in force, which provided that trustees and pledgees should be held liable as stockholders for the debts of the company whose stock they held.

In the First National Bank *v.* Hingham, 127 Mass. 569, also cited in notes to 853, Morawetz on Private Corporations, a pledgee was held liable as a stockholder, not because of his character as pledgee, but because he had not followed the statutory method of causing the facts showing the qualified nature of his holding to appear upon the corporation books.

The same may be said of Johnson *v.* Summerville Dyeing Co., 15 Grey 216, also cited in Morawetz on Corporations, section 853.

Plaintiff's reference to Thompson on Liability of Stockholders, section 233, must be a mis-citation, as section 233 makes no reference to the position or liability of a pledgee of stock.

Plaintiff probably intended to refer to section 223, Thompson on Liability of Stockholders, which is as follows:

"It is well settled that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the register of the corporation as the owner of the stock, is, in the event of the insolvency of the corporation, chargeable as a stockholder for the benefit of creditors. The reason why the courts so hold, briefly, is that a man cannot become the legal owner of stock, receive dividends, vote at elections, and enjoy all other rights appertaining to the ownership of it, without shouldering the liabilities attaching to such a position. Another good reason is that he will not be suffered to hold himself out to the public as the owner of stock and afterwards deny that relation."

This language clearly shows that a pledgee's liability as a shareholder is determined not by the fact that he holds the

stock, but by the fact that, by his voluntary act, he has led the public to believe him to be a stockholder. This is but an application of the doctrine of equitable estoppel applied in National Bank *v.* Case, and discussed elsewhere herein. The citations made by Thompson in support of his text are the cases herein commented on which hold a pledgee liable as a shareholder when he appears on the corporation books as absolute owner.

To same effect, see Thompson on Corporations, volume 3, sections 2935, 3192, 3193.

Plaintiff also cites National Commercial Bank *v.* McDonnell (incorrectly cited by defendants as "McDonald") *et al.*, 92 Ala. 387, 9 Southern Reporter 149. It is true that, as shown by the quotation at page 7 of plaintiff's brief, "The shares were noted on the stock ledger as held by the bank as collateral security." But it is also true that, later, the shares were surrendered, new certificates issued in the name of the bank, "which was entered and stood on the books of the company as a stockholder until the company failed and made the assignment." [See page 150 of 9 Southern Reporter.] In the case cited, the pledgee was held liable as a shareholder by reason of his causing himself to appear as absolute owner of the pledged stock. The court bases its decision upon Wheelock *v.* Kost, Bank *v.* Case, and other adjudications, which state the rule to be as decided by the Alabama court.

All the cases cited by the Alabama court, as shown elsewhere herein, place the pledgee's liability upon the ground of equitable estoppel. In concluding its discussion of this branch of the case, the Alabama court says, [See page 150 of 9 Southern Reporter]:

"The bank having voluntarily surrendered the certificates received from Proskauer (the pledgor) and procured the transfer of the shares to be made on the books of the insurance company, and new certificates to be issued in its own name, changed its apparent holding as pledgee to that of legal owner; thereby assuming the relation of stockholder to the company and the creditors, acquiring as to the former all the rights, and as to the latter all the responsibilities, of a shareholder. On the undis-

puted facts, the bank is a stockholder, within the meaning of the constitution and the statute."

Thus, upon a thorough and not upon a *partial* examination, it appears that the case cited does not sustain plaintiff's position, but was based upon facts which do not exist here.

Counsel cites also Pullman *v.* Upton, 96 U. S. p. 328. In this case defendant made a loan to a stockholder of Gt. Western Ins. Company, taking stock as collatoral security. Liability was imposed on defendant, upon the ground that he had *caused himself to appear as the owner of the stock.* It did not appear that the corporation records showed that defendant held the stock as pledgee. Adderly *v.* Storm, Wheelock *v.* Kost, and Holyoke Bank *v.* Burnham are cited, and the decision based upon their authority. As none of these cases hold that one whose name appears upon a corporation's books as pledgee is liable as a stockholder, a case which follows them as authority can not be cited in support of such a claim.

The English cases cited in Pullman *v.* Upton can not be regarded as authority here. In one of those cases it was held that when the transfer showed that it was made to a "trustee" the transferee was liable as a stockholder.

As this is directly against the provisions of section 5152, Revised Statutes, which in express terms exempts trustees from liability, upon a showing that the English decisions are diametrically opposed to the U. S. statute in some of its most important provisions, the reasonable conclusion is that these decisions are based upon a statute radically different from ours, and consequently not authority in determining questions arising herein.

Referring to these English cases, the Supreme Court of the United States says:

"The courts in England and some in this country have gone very far in sustaining a liability for unpaid subscriptions to stock against persons holding the same in any capacity whatever, whether as trustees, guardians or executors, or merely as collateral security. It cannot be denied that in some cases the extreme

length to which the doctrine has been pushed has operated very harshly, and in cases in which the corporation itself has no just right to enforce payment, and where no bad faith or fraudulent intent has intervened, it may be doubted whether creditors have any better right, unless by force of some express provision of a statute."

Counsel for plaintiff cites German American National Bank *v.* Case, 99 U. S. 628. In this case the court uses this language:

"Such being the facts of the case, there can be no serious controversy respecting the principles of law applicable to them. It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in Pullman *v.* Upton, 96 U. S. 328, (XXIV, 818); and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: Adderly *v.* Storm, 6 Hill 624; Rosevelt *v.* Brown, 11 N. Y. 148; Bk. *v.* Burnham, 11 Cush. 183; Magruder *v.* Colston, 44 Md. 329; Creese *v.* Babcock, 10 Met. 525; Wheelock *v.* Kost, 77 Ill. 296; Matter of Emp. C. Bk., 18 N. Y. 199; Hale *v.* Walker, 31 Iowa 344. For this several reasons are given. One is that he is estopped from denying his liability *'by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made.'"*

Plaintiff cites Wheelock *v.* Kost, 77 Ill. 296, as follows: "Primarily he [a creditor of the corporation] may proceed "against the party in whom is the legal title to the stock. It "is for the reason that the property is in his name and the "legal ownership appears to be in him." This language does not assist plaintiff in this case. It says a creditor may proceed against the party in whom the *ownership* appears to be. The law says the ownership of the stock is in Dare and Havermale. Consequently, the exercise of plaintiff's primary right can impose no liability upon this defendant.

The court will observe that *in every case cited by plaintiff, the person sought to be held liable attempted to evade liability by proving that he held as pledgee, notwithstanding the fact that upon the corporate records he appeared as absolute owner.* The decisions are all to the effect that by such conduct, by hold-

ing themselves out to the world as absolute owners, thus inducing innocent persons to deal with the corporations on the credit of their names, the defendants lost the right to rely upon the real nature of their holdings. In other words, the courts have uniformly held that when the corporate records show that a person holds stock absolutely, he is estopped to show that he holds it as collateral security.

Plaintiff in error next cites Gilman *v.* Curtis, 66 Cal. 116. This case is not in point, either by reason of involving a similar state of facts, or enunciating principles of law relevant to the present discussion.

That case does hold that the transaction there involved, which was a pledge of an insurance policy, had the effect, as between the pledgor and pledgee, of vesting the legal title to the pledge in the pledgee, leaving the pledgor the right to receive the surplus remaining after the payment of the debt secured.

The result of this decision is, that the pledgee holds the legal title to the pledge, leaving the equitable title in the pledgor; in other words, that the pledgee is a trustee. This conclusion might with safety be admitted by defendant, and is in line with our argument to the effect that the pledgee is a trustee within the meaning of section 5152, Revised Statutes. But Gilman *v.* Curtis does not decide that, as between the parties to the pledge, the absolute title—the ownership—passes to the pledgee, but merely that qualified special ownership, with an equitable reversionary interest in the pledgor, which is the essential characteristic of a trust.

Plaintiff's next citation is Johnston *v.* Laflin, 103 U. S. 800. In this case the transaction which imposed upon the transferee the liability of a shareholder was an absolute sale of stock. There was no pledge involved in the case, or referred to in any of the transactions between the parties. The question decided was that between the transferrer and transferee the delivery of the certificate of stock,

with a blank power of attorney thereon indorsed, passed the title to the stock.

In Cecil National Bank *v.* Watsontown National Bank, 105 U. S. 217, cited by plaintiff, the facts were as follows: Powell & Co. pledged stock of the Watsontown bank to the Cecil National bank, to secure two notes, each note containing a stipulation for the sale of the stock, upon default in payment of the note. Default was made, the pledgee exercised his right to sell, and directed the cashier of the Watsontown bank to transfer the stock on the books. It was held that as between the parties the absolute title to the stock passed by virtue of the stipulation in the note, and the exercise of the power thereby created. The object of the action was to compel the Watsontown National bank to issue to Cecil National bank a certificate of stock. It was held that the absolute title passed to the Cecil National bank, not as a pledgee, but as a purchaser, and that the Watsontown bank could be compelled to issue to it a certificate of the stock. The action did not seek to enforce the liability of the Cecil National bank as a holder of the stock of the Watsontown bank. The result of the decision is that the court held that the facts in that case made the Cecil bank the absolute owner of the stock of the Watsontown bank.

The court does not use the language quoted by plaintiff at page 8 of his brief; but an examination of the entire opinion will show that the court held that the title passed to the Cecil National bank, not by virtue of its pledge, but by virtue of its exercise of its power to *transfer the stock to itself absolutely in payment of its debt.* The Cecil National bank did not come before the court as pledgee, but as owner of the stock. It is true that its title had inception in a pledge; but it came before the court as absolute owner for the purpose of asserting its rights as such.

Easton *v.* German American Bank, 127 U. S. 532, cited by plaintiff to the effect that a pledge of stock renders the pledgee the absolute owner of the stock, does not sustain

that position; but on the contrary the case expressly holds that the pledgee is a trustee for the pledgor. [See p. 212 of Law. Coop. Ed. Bk. 32.] The court used this language:

"By virtue of the pledge, the pledgee has the right by law, on the default of the pledgor, to sell the property pledged in satisfaction of the pledgor's obligation. As in that transaction the pledgee is the vendor, he cannot also be the vendee. In reference to the pledge and to the pledgor, he occupies a fiduciary relation, by virtue of which it becomes his duty to exercise his right of sale for the benefit of the pledgor. He is in the position of a trustee to sell, and is by a familiar maxim of equity forbidden to purchase for his own use at his own sale."

Plaintiff cites Heath *v.* West, 28 N. H. 108, and Peers *v.* McLaughlin, 88 Cal. 299, to the effect that a party cannot apply to his own use the benefit of a transaction, and repudiate the burden. This proposition of law is admitted, but is not applicable here. The doctrine announced is an application of a principle of equitable estoppel, and is limited in its operation to the immediate parties to the transaction. Third parties are not concerned. In the case at bar, the defendant never received any benefit from plaintiff, and there is no reason why, as against plaintiff, it should not be permitted to deny that it is a stockholder of the San Diego Bank. Whatever defendant received or was entitled to receive, was by the very terms of the trust to be applied for the benefit of the pledgor not for that of the pledgee. Plaintiff's citation, in effect, held that one must pay for what he receives, and cannot deny his obligation to pay, and at the same time retain what he agreed to pay for. In this case defendant has received no such benefit as would impose upon it a corresponding burden. All the proceeds of the transfer were to be either applied to pay the pledgor's debts or returned to the pledgor.

It will be noted that in Heath *v.* West, 28 N. H. 108, cited by plaintiff, the court says by way of illustration: "Thus it has been held that an infant cannot avoid a mortgage and affirm a deed, when both are made at one and the same time, relate to the same property, *and go to make up one transaction.*" [The italics are ours.] Thus showing that to create

the estoppel contended for by plaintiff, it is essential that the benefit received, and the burden thereby imposed should result from one and the same transaction. Applying this principle to the case at bar, the result would be that, as against Havermale and Collins, defendant would not be permitted to deny its position as pledgee.

But as plaintiff was not a party to the contract by which the stock was pledged, and therefore, did not participate in the transaction, which conferred upon defendant a benefit, and imposed upon it a burden, plaintiff does not show himself entitled to the benefit of the rule of Heath *v.* West and Peers *v.* McLaughlin.

As to the citation of Gen. xxxviii, 16, 17, 18, however valuable the principle therein illustrated may prove to plaintiff's counsel in the regulation of his own conduct, it is submitted that it is not relevant to the present discussion.

Respectfully submitted,

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